

STATE OF MICHIGAN
COURT OF APPEALS

In re MCCOY, Minors.

UNPUBLISHED

April 23, 2020

No. 350191

Van Buren Circuit Court

Family Division

LC No. 16-018539-NA

Before: SAWYER, P.J., and LETICA and REDFORD, JJ.

PER CURIAM.

Respondent-father¹ appeals as of right the trial court order terminating his parental rights to his then 10-year-old twin boys under MCL 712A.19b(3)(h) (incarceration depriving children of a normal home) and MCL 712A.19b(3)(j) (risk of harm). In light of our Supreme Court’s 2010 decision in *In re* Mason, 486 Mich 142; 782 NW2d 747 (2010), and our 2016 decision in *In re* Pops, 315 Mich App 590; 890 NW2d 902 (2016), we reverse and remand for further proceedings consistent with this opinion because the trial court clearly erred in determining that the statutory requirements were met.

I. BACKGROUND

This case arises from a lengthy procedural and factual history. In 2016, respondent was imprisoned for drug-related offenses. His earliest parole eligibility date is February 26, 2021. With DHHS’s assistance, respondent executed a power of attorney, placing all three children, whom he had previously cared for, with his mother. Within a few months, DHHS petitioned for removal as respondent’s mother had allowed and refused to eject a convicted sex offender living in the home. Although DHHS knew of this individual’s background, respondent maintained he was shocked and enlisted his brother to provide care for his children. Recently, the children’s

¹ The children’s mother is not a party to this appeal and regained custody of the couples’ older child. However, mother voluntarily terminated her parental rights to the twins. The Department of Health and Human Services (DHHS) closed its case as to the couples’ older child, leaving respondent’s parental rights intact solely as to that child.

mother had been arrested for drug possession, and, with DHHS's assistance, she agreed to complete a power of attorney, placing the children with respondent's brother.

At the adjudicative hearing, the preceding events were recounted and a foster care worker testified that the children's mother's home was unsafe because of criminality. The court exercised jurisdiction over the children.²

Months later, the trial court held the dispositional hearing. At that point, the children were no longer residing with respondent's brother, but were placed with separate foster parents. Respondent was unable to participate in prison programming until the following year so DHHS required him to stay up-to-date on the case and attempt involvement in any services that became available.

At a later review hearing, it was reported that the children were moved to a different foster home and that the children's mother resumed using drugs. Respondent continued to remain in contact with his children, sending cards and letters. Respondent also participated in voluntary AA/NA programs and maintained communication with the caseworker, responding to DHHS paperwork. Additionally, another of respondent's relatives was investigated as a potential placement for the children. Because that relative's spouse had an 8-year-old misdemeanor assault conviction, DHHS's policy required a waiver before placement could be accomplished.

At a permanency planning hearing in 2017, it was reported that mother was criminally charged with fleeing and eluding. Respondent was moving forward and had recently obtained a job inside the prison. Respondent also suggested another one of his relatives for placement. As of the worker's last contact, however, this relative needed to think about caring for the children. At that point, respondent's earlier proposed relative placement also remained an option.

The trial court approved DHHS filing a termination petition. Three months later, DHHS had not filed a termination petition and a review hearing was held. Respondent remained engaged with DHHS and his children. He had started a new job in prison and provided another potential placement. As this proposed placement would not be with a relative, per DHHS's policy, the potential caretaker needed to secure a foster care license. That process would require between 3 to 6 months. The trial court denied respondent's request for video contact with his children in light of DHHS's intention to file a termination petition.

Two weeks later, DHHS filed the supplemental petition, seeking termination under MCL 712A.19b(3)(b)(ii) (failure to prevent abuse), (g) (failure to provide proper care and custody), (h) (imprisonment for a period exceeding 2 years that deprives the children of a normal home), and (j) (reasonable likelihood of harm if the children were returned).

During a review hearing in early 2018, respondent continued to remain in contact with his caseworker and his children via letter and telephone. DHHS was still investigating respondent's suggested placements and had added respondent's maternal grandmother to the mix. Despite the earlier 3- to 6-month timeline for becoming a licensed foster parent, the caseworker was now

² Respondent does not challenge the trial court's adjudication.

unable to provide any timeline for this process. It was noted that mother was making some progress.

The next day, the trial court presided over the first termination hearing. DHHS reported that with two exceptions, none of respondent's proposed relative placements were appropriate. The two exceptions were respondent's maternal grandmother and his cousin, who was working to become licensed. Again, mother's continued improvement was noted. She had progressed with her mental health and drug addiction issues, was furthering her education, and secured employment.

The trial court determined that termination as to respondent was appropriate under MCL 712A.19b(3)(h), but not (j), as there was insufficient evidence that his conduct was harmful to the children. But the trial court also determined that it was not in the children's best interest to terminate respondent's parental rights given their bond. Likewise, the court did not terminate mother's parental rights.

Weeks later, mother demonstrated significant improvement. Respondent continued prison programming to the extent possible and remained in contact with his children. Mother and the oldest child were bonded, but she and the twins did not share as strong a bond. The court increased mother's parenting time and authorized transitioning to unsupervised parenting time for her.

At the next review hearing, mother had secured a single-bedroom house and her drug screens continued to be negative. Respondent remained in contact with his children, and, although he was willing to participate in the prison programs recommended by DHHS, he still did not qualify. Respondent asked the court to increase his telephone visitation time.

Months later, DHHS considered reunifying mother with the couple's oldest child. The twins, however, expressed a desire not to return to their mother's care. The twins had a strong bond with respondent and were only willing to consider adoption because their foster parents would allow them to continue contact with respondent.

Thereafter, the oldest child was successfully transitioned to mother, who continued to progress. Again, the twins reportedly indicated that they did not wish to return to their mother's care. Respondent continued his communication with his children. Respondent could do nothing more given the prison limitations placed on his programming. Mother informed the court that she had discussed voluntarily relinquishing her parental rights to the twins with her attorney. Respondent, on the other hand, did not want to give up his rights to them.

As the months passed, mother repeated her desire to voluntarily terminate her parental rights to the twins. Respondent reiterated his opposition to voluntarily terminating his parental rights.

In spring 2019, the trial court held another permanency planning hearing. All three children were doing well. The oldest child continued to live with mother as the twins lived with their foster parents. Father remained incarcerated and engaged in available services and programming, including completing a number of substance-abuse and behavior-management classes. The twins wrote to respondent.

Mother again expressed her desire to release her parental rights to the twins. Respondent remained firm in seeking to regain custody. After mother released her rights to the twins, the DHHS closed its case as to the oldest child, leaving respondent's parental rights intact as to that minor.

According to the caseworker, the twins expressed a desire to remain with their current foster family. Respondent was only 22 months from his earliest release date and continued his quest for a relative to provide interim care for the twins. Respondent asked the trial court to consider guardianship in lieu of termination and the trial court confirmed that guardianship was a possibility. However, DHHS argued that the twins required permanence and that 22 months plus the additional time that respondent would need to fully recover once he was released from prison was simply too long for the twins to remain in foster care given their age.

Noting that the twins had been under the court's jurisdiction for over two years, the trial court opined respondent was not in a position to care for them. Although recognizing that respondent clearly loved his twins, the court authorized DHHS to file a second petition to terminate his parental rights to them.

On July 24, 2019, the trial court presided over the termination hearing. Respondent testified that he had served as the sole parent for his children after he and their mother separated. Respondent's behavior in prison was exemplary and he was "pretty sure" that he would be released on his earliest parole eligibility date of February 26, 2021. While incarcerated, respondent participated in all available classes; unfortunately, parenting classes were not yet available at his institution. Upon parole, respondent hoped to find employment as an electrician, a field in which he had received training. Respondent planned to live with a relative who had a four-bedroom house with room for his twins if the Department of Corrections approved that placement.³ Respondent projected it would take an additional 6 to 8 months to resume his parental role. Respondent had a bond with his twins and they told him that they loved him during their conversations.

The caseworker opined that respondent would require 6 to 9 months of sobriety, stable housing, and employment before his barriers to reunification could be overcome. Respondent would be required to attend parenting classes and a program to assess the bond between himself and the twins. There would be 6 months of supervised parenting time followed by 6 months of unsupervised parenting time.

Commendably, respondent had never missed telephonic parenting time with his children, but their conversations were only 5 to 10 minutes in length. Notably, respondent funded these calls through his work inside the prison.

³ This was the placement that DHHS had previously stated would require a waiver in light of the relative's spouse's then 8-year-old misdemeanor assault conviction.

According to the caseworker, the bond between respondent and his children was dwindling as evidenced by their failure to make unprompted contact for 4 to 5 months. But, when prompted, the children were excited to send cards or letters to respondent.

At the conclusion of the hearing, the trial court terminated respondent's parental rights to his twins under MCL 712A.19b(3)(h) and (j), concluding that the bond between them diminished during his incarceration. This appeal followed.⁴

II. STANDARD OF REVIEW

"In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re Vanderlin*, 293 Mich App 120, 139; 809 NW2d 412 (2011). We review for clear error a trial court's factual determination that statutory grounds exist for termination. *Id.*; MCR 3.977(K). "A finding of fact is clearly erroneous if the reviewing court had a definite and firm conviction that a mistake had been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

III. ANALYSIS

The trial court terminated respondent's parental rights to the minor children under MCL 712A.19b(3)(h) and MCL 712A.19b(3)(j). We conclude that the trial court clearly erred.

A. MCL 712A.19b(3)(j)

In pertinent part, MCL 712A.19b(3) provides:

The trial court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

We begin our analysis by recognizing that the Supreme Court has cautioned against terminating a respondent's parental rights based on his or her incarceration. *In re Mason*, 486 Mich at 162-165. There, our Supreme Court held that neither incarceration nor criminal history

⁴ Neither DHHS nor the twins' guardian ad litem has filed a brief on appeal.

alone are grounds for termination of parental rights. *Id.* at 165. Specifically addressing subsection (j), the Court held:

Termination on this ground was clearly erroneous because no evidence showed that the children would be harmed if they lived with [the] respondent upon his release. Significantly, just as incarceration alone does not constitute grounds for termination, a criminal history alone does not justify termination. Rather, termination solely because of a parent's past violence or crime is justified only under certain enumerated circumstances, including when the parent created an unreasonable risk of serious abuse or death of a child, if the parent was convicted of felony assault resulting in the injury of one of his own children, or if the parent committed murder, attempted murder, or voluntary manslaughter of one of his own children. [*In re Mason*, 486 Mich at 165 (citations omitted).]

Notably, there was no evidence that the respondent in *Mason* “had ever harmed a child”; instead, his “criminal history consisted largely of short jail stints for comparatively minor offenses.”⁵ *Id.* at 148, 151, 165. Without evidence of future harm, the Supreme Court reversed the trial court's termination of the respondent's parental rights under MCL 712A.19b(3)(j). *In re Mason*, 486 Mich at 165.

We followed *Mason* in *In re Pops*, holding that trial court improperly relied upon the respondent's current incarceration to determine the risk of harm to the child rather than “scrutiniz[ing] the likelihood of harm if the child w[as] returned to the parent's home *after* the parent's release from prison.” *Pops* at 600. Looking to the respondent's current incarceration fails “to address the likelihood that [his child] would be harmed based on [the] respondent's ‘conduct or capacity.’ ” *Id.*, quoting MCL 712A.19b(3)(j). Stated otherwise, the risk-of-harm analysis under MCL 712A.19b(3)(j) must consider the respondent's “conduct and capacity” rather than his mere absence. *Id.* This Court further rejected the conclusion that the respondent's criminal record, including a resisting and obstructing and possession of a concealed weapon convictions, created an unreasonable risk of serious abuse or death to the respondent's child. *Id.* at 600-601. This remained true even though the facts underlying the resisting and obstructing offense were that the respondent had fled from the police for several blocks in a vehicle with his child as a passenger. *Id.* at 601.

In this case, DHHS's initial petition to terminate respondent's parental rights requested termination under subsection (j) because respondent's incarceration and failure to secure an alternative placement evidenced a reasonable likelihood that harm would come to his children if they were returned to his care. Following the initial termination hearing, the trial court declined to terminate respondent's rights under MCL 712A.19b(3)(j), concluding that it had heard no

⁵ The crimes were drunk driving for which the respondent was sentenced to jail, larceny for which he received a prison sentence, and a criminal sexual conduct conviction which he described as arising from a consensual sexual encounter with his underage girlfriend when he was a teenager.

evidence that respondent's conduct was sufficient to be considered harmful to his children. This determination was consistent with the holdings of *Mason* and *Pops*.

But, at the conclusion of the second termination hearing, the trial court agreed that termination of respondent's parental rights was warranted, saying:

[W]e move to [MCL 712A.19b(3)(j),] which is there's a reasonable likelihood based on the conduct or capacity of the child's parent that the child would be harmed if returned to the home of the parent. [Respondent] is unable to care for [his twins] at this time and he's unable to provide proper care through any other placement. Therefore, the Court does find by clear and convincing evidence that . . . MCL 712A.19[b(3)(j),] has been proven. It is clear that he is not able to while he's in prison to provide them with care and his attempts in the past to provide them with care have been not good, and in fact at this point there was no relative that appears to be a suitable placement.

In other words, the trial court relied upon (1) respondent's inability to care for his minor children because he was in prison and (2) his failure to identify a suitable relative placement during his incarceration. Critically, the trial court failed to "scrutinize the likelihood of harm if the child were returned to the parent's home *after* the parent's release from prison." *In re Pops*, 315 Mich App at 600. Rather than addressing how respondent's "conduct or capacity" would harm the minor children *after* respondent's release from prison as required by MCL 712A.19b(3)(j), the trial court improperly looked to respondent's passive absence due to his incarceration. This alone requires reversal under *Mason* and *Pops*.

But, there is more. Respondent's criminal history includes larceny in a building in 2005, maintaining a drug house in 2014, and operating a methamphetamine laboratory, which respondent asserts occurred outside the presence of his children. In light of the trial court's recognition that respondent "has been doing everything to make sure that when he gets out he does not fall back into his drug addiction," and this Court's holding that "drug use alone, in the absence of any connection to abuse or neglect, cannot justify termination," *In re LaFrance*, 306 Mich 713, 731; 858 NW2d 143 (2014), the evidence presented throughout these proceedings was insufficient to support termination. Indeed, respondent's unrefuted testimony demonstrated that he was the primary caretaker for his minor children before he was incarcerated. He took them to doctor appointments, ensured they attended school, and provided them with food and clothing. While incarcerated, respondent worked as a porter in the infirmary; this position involved caring for sick, mentally ill, and dying prisoners. Respondent changed diapers, helped infirm prisoners with their hygiene needs, and provided suicide watch services. This is significant evidence that respondent possesses the capacity to care for vulnerable individuals.

Moreover, as already discussed, during the first termination hearing, the trial court held that there was insufficient evidence to support the termination of respondent's parental rights under MCL 712A.19b(3)(j). Consistent with the teachings of *Mason* and *Pops*, the trial court explicitly ruled that there was no evidence that "these parents would never be able to care for these children safely." No evidence presented thereafter rebutted the trial court's initial finding.

Similarly, respondent's failure to identify a relative caregiver for his twins during his incarceration fails to demonstrate a reasonable likelihood that based on *his* conduct or capacity that the twins would be harmed if returned home. Accordingly, we conclude that there was insufficient evidence of potential future harm to the minor children after respondent's release from prison. Therefore, the trial court clearly erred when it terminated respondent's parental rights to his twins under MCL 712A.19b(3)(j).

B. MCL 712A.19b(3)(h)

Because one ground alone is sufficient to support termination, we must also address the trial court's determination that termination was warranted under MCL 712A.19b(3)(h). Again, we conclude that the trial court clearly erred.

In pertinent part, MCL 712A.19b(3) reads:

The trial court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

As already discussed, our Supreme Court has cautioned against terminating a respondent's parenting rights solely because of his or her incarceration or criminal history. *In re Mason*, 486 Mich at 162-165. Regarding subsection (h), our Supreme Court ruled:

The combination of the first two criteria—that a parent's imprisonment deprives a child of a normal home for more than two years and the parent has not provided for proper care and custody—permits a parent to provide for a child's care and custody although the parent is in prison; he need not personally care for the child. The third necessary condition is forward-looking; it asks whether a parent "will be able to" provide proper care and custody within a reasonable time. Thus, a parent's past failure to provide care because of his incarceration also is not decisive. [*Id.* at 161 (emphasis omitted).]

Each of these three criteria must be met in order to terminate a respondent's parental rights. *Id.* at 160.

In *Mason*, our Supreme Court reversed the trial court's order terminating the respondent's parental rights under MCL 712A.19b(3)(h). There, the respondent was sentenced to 3 to 10 years' imprisonment and his maximum discharge date was not until July 2016. *In re Mason*, unpublished memorandum opinion of the Court of Appeals, issued September 15, 2009 (Docket No. 290637), rev'd and remanded 486 Mich at 146. The Supreme Court explained that the trial court erred because DHS did not seek termination of the respondent's parental rights until he was less than

two years from parole. *Id.* at 162 (“[T]he [trial] court failed to account for the fact that the DHS did not seek termination of [the] respondent’s . . . parental rights until December 3, 2008. At that time, [the] respondent anticipated being paroled in less than two years; indeed, he was paroled less than one year later, on September 22, 2009.”). See also *In re Baham*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 349595, rel’d April 2, 2020) (opinion of KELLY, M.J.), slip op at 9.

Similarly, in this case, the trial court did not terminate respondent’s parental rights until respondent was within less than two years of his earliest parole eligibility date. During the July 24, 2019 termination hearing, the trial court specifically noted that respondent’s earliest parole eligibility date was February 26, 2021. This was a period of 1 year, 7 months, and 2 days. Thus, absent evidence that respondent would not be released on his earliest parole date, he will be incarcerated for less than two years. At the second termination hearing, respondent testified that he was “pretty sure” that he would be paroled on his first parole eligibility date in light of his exemplary behavior while institutionalized.

Recognizing that respondent’s parole date was within two years, the trial court mentioned that respondent would deprive his children of a normal home for five years (the length of his minimum sentence) and it also factored in the additional 6 to 9 months it estimated would be required before respondent would be capable of caring for his children. The trial court legally erred in relying on respondent’s 5-year minimum sentence to establish the necessary two-year statutory timeframe. The *Mason* Court explained that “a parent’s past failure to provide care because of his incarceration . . . is not decisive.” *Id.* at 161. Rather, the first prong—that the respondent’s incarceration results in the children being “deprived of a normal home for a period exceeding 2 years”—is forward-looking. *Id.* at 161 n 12. See also *In re Baham*, ___ Mich App ___, slip op at 9. In other words, just as in *Mason*, the trial court should have only considered the time that respondent remained imprisoned. Respondent’s anticipated period of parole was not relevant to determining whether his children would be deprived of a normal home *due to his imprisonment* for more than two years. Indeed, the *Mason* Court also faulted the trial court for considering unsupported evidence that the respondent would require at least six months after release to settle his life before parenting. *Id.* at 162 (finding that it was improper to terminate “on the basis of [the] largely unsupported opinion, that it would take at least six months for respondent to be ready to care for his children after he was released from prison”); see also *In re Baham*, ___ Mich App ___, slip op 9. Like testimony was presented here. The caseworker could offer no opinion regarding respondent’s parenting ability because she had never observed respondent interact with his twins outside of supervised telephonic visits. *In re Mason*, 486 Mich at 162 n 13. Indeed, DHHS relied solely upon programming available in the prison. Parenting classes were not yet available but DHHS failed to use other methods, such as workbooks, to aid respondent. Respondent did all that he could do to maintain his connection with his children—sending cards and letters and funding and, more importantly, never missing a telephonic visit. In fact, respondent requested increased telephonic time and his request for videoconferencing was denied.

In light of DHHS’s failure to establish all three necessary statutory components, we conclude that the trial court clearly erred in terminating respondent’s parental rights under MCL 712A.19b(3)(h). *Id.* at 160. Because neither ground relied upon by the trial court was satisfied, we reverse the trial court’s termination order.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Anica Letica

/s/ James Robert Redford